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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 822

TRINIDAD CORPORATION, Claimant of the Tankship LYONS CREEK,

Petitioner,

versus

INDIAN TOWING COMPANY, INC.,

Respondent.

PETITION OF TRINIDAD CORPORATION, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF TRINIDAD CORPORATION, CLAIMANT OF TANKSHIP LYONS CREEK, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOS. M. RAULT,
BENJAMIN W. YANCEY,
ALFRED M. FARRELL, JR.,
Proctors for Petitioner

TERRIBERRY, RAULT, CARROLL,
MARTINEZ & YANCEY
Of Counsel

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I.

REPORTS OF OPINIONS BELOW

Indian Towing Company, Inc. v. The Tankship LYONS CREEK, 187 F. Supp. 774, 1961

A.M.C. 920 (United States District Court, Eastern District of Louisiana);

Trinidad Corporation, claimant of the Tankship LYONS CREEK, appellant, v. Indian Towing Company, Inc., appellee, 293 F. 2d 107, 1961 A.M.C. 2131 (United States Court of Appeals, Fifth Circuit).

Copies of these opinions are included herewith as appendices.

II.

GROUND OF JURISDICTION

The decree sought herein to be reviewed is that entered on August 3, 1961 by the Court of Appeals for the Fifth Circuit, affirming the decree of the district court. On August 23, 1961, timely motion for rehearing was filed in the Court of Appeals, which rehearing was denied by the Court of Appeals in an order entered December 29, 1961.

Jurisdiction of this court to review the decree in question is conferred by United States Code, Title 28, Section 1254 (1).

III.

QUESTIONS PRESENTED

In this case, the tug COMANCHE, pushing two deeply loaded barges descending the Mississippi River, capsized

and sank, with the loss of two lives, when petitioner's ocean tankship, LYONS CREEK, passed in the opposite direction some 500 feet off. The LYONS CREEK was held liable for not having seen the COMANCHE, not having realized that she was a tug pushing a tow, and thus, for not having slowed down.

Most remarkably, however, the COMANCHE had failed to sound the danger signal required of her by law when the ascending vessel, LYONS CREEK, had not herself signaled; had failed to sound the danger signal required of her by law when "for any reason" a vessel "fails to understand, or regards as unsafe, the course or intention of the other"; and had failed to sound the danger signal required of her by law "whenever, from any cause, one steam vessel is imperiled by another". Further, the lights of the COMANCHE and her tow were in direct violation of the law in that they were not visible for the distance required by law; those of the tow were not visible over the arc required by law; and those of the tow were not placed at the distance above the water line required by law. These violations of law were uncontraverted. The very purpose of the laws and regulations on these points is to avoid what happened here, that is, to insure that the first vessel does not proceed in ignorance of the other's presence, and to alert her to the danger.

Notwithstanding these serious violations of law by the COMANCHE, compliance with which certainly would have averted the disaster and saved two lives, the courts below exonerated her, and overlooked or condoned or ignored or, at the very least, failed to take into account her violation of six mandatory, statutory duties.

Thus the questions presented for review are:

(a) Whether a vessel which is in serious violation of the mandatory, statutory navigation rules (failure to agree, by whistle signal, to a passage; failure to sound the danger signal; failure to exhibit proper lights) can be exonerated from the effects of those violations, where compliance with law would have alerted the other to her presence, would have averted the disaster, and would have prevented the loss of two lives;

(b) Whether the long established and salutary rule of *The Pennsylvania*, 86 U. S. (19 Wall.) 125, 136, 22 L. Ed. 148, 151, placing upon the vessel which has admittedly violated the mandatory rules a heavy burden of exculpation, has not been completely ignored and overlooked by the courts below;

(c) Whether the decision in this case is not in conflict and at variance with *The Pennsylvania*, supra;

(d) Whether the decision in this case is not in conflict and at variance with the decision of this court in *Kernan v. American Dredging Company*, 355 U. S. 426, 2 L. Ed. (2d) 382, 1958 A. M. C. 250, in which this court held the vessel absolutely liable in a Jones Act case for death directly resulting from one of the admitted violations here, failure to have the barge's lights the required distance above the water;

(e) Whether the decision in this case is not in conflict and at variance with the decision of the Third Circuit in *Tidewater v. Syosset*, 203 F. 2d 264, 1953 A. M. C. 730, where the vessel which failed to sound the statutory danger signal was held mutually at fault, even though the other was grossly at fault;

(f) Whether the safety of life and property on navigable waters of the United States does not require a strong reassertion by this court that the strict enforcement of the navigation rules, and the holding of vessels violating those rules to full accountability, is vitally essential.

IV.

STATUTES INVOLVED

The statutes involved are those commonly known as the Western River Rules, U. S. C. Title 33, Sections 301 et seq., and more particularly Sections 301, 311, 312, 343, 349; and the rules promulgated pursuant to the statute by the Commandant of the United States Coast Guard, Title 33 C. F. R. Sections 95.01 et seq., and more particularly Sections 95.01, 95.09, 95.19 and 95.29.

The pertinent sections of the statutes and of the Coast Guard Pilot Rules as then in effect are included herewith as an appendix.

V.

STATEMENT OF THE CASE

At night, in the Mississippi River, just above New Orleans, in waters governed by the Western River Rules, petitioner's ocean tankship, the LYONS CREEK, bound upstream, about a half mile above the Huey P. Long Bridge, passed, starboard to starboard, and about 500 feet off, the downbound tug COMANCHE, which was pushing a tow consisting of two deeply loaded tank barges, in tandem. After the LYONS CREEK had passed, the COMANCHE encountered wave wash and turbulence, her starboard towing gear parted, she lost control of her tow, fell down on a pier of the bridge, and capsized with a loss of two lives, both members of the crew of the COMANCHE.

The COMANCHE herself has settled, non-prejudicially, the claim for one of the deaths; the other death claim lapsed for lack of beneficiary.

Both courts below condemned the LYONS CREEK for having failed to see the COMANCHE. However, both courts completely overlooked the fact that the COMANCHE herself was guilty, admittedly and without contradiction, of six violations of mandatory, statutory duty imposed by the navigation rules for the very purpose of alerting one vessel to the presence of the other. The decision in its present posture presents the anomaly of one vessel having been held at fault for not having seen the other and not having appreciated that the other was in fact a tug and tow underway; whereas the other has been exonerated in the face of her complete non-compliance with and violation of the very

rules designed to alert the first vessel to the other's presence:

(1) Failing to sound the danger signal mandatory on the descending vessel (COMANCHE) where the ascending vessel (LYONS CREEK) has not signaled, and where the vessels are within one-half mile of each other, Title 33 U.S.C. Section 343 (b);

(2) Failing to sound the danger signal mandatory, under the Pilot Rules, "whenever, for any cause, one steam vessel is imperiled by another", Title 33 C.F.R. Section 95.09 (b)-(3);

(3) Failing to sound the danger signal mandatory where either of the approaching vessels "for any reason fails to understand, or regards as unsafe, the course or intention of the other," Title 33 U.S.C. Section 349 (a);

(4) Violation of the requirement that the barge's running lights (that is, the red and green side lights) be fixed eight feet above the water, the precise requirement violation of which was held by this court to constitute absolute liability in a case under the Jones Act for the death of crew members, *Kernan v. American Dredging Company*, 355 U.S .426, 2 L.Ed. (2d) 382, 1958 A.M.C. 250;

(5) Failure to comply with the requirement that the side lights of the barge be equipped with

inboard screens with the arc of visibility specifically prescribed by Title 33, U.S.C. Section 312, and Title 33 C.F.R. Section 95.29;

(6) The admitted failure to comply with the requirement that the lights be "visible at a distance of at least three miles", Title 33 U.S.C. Section 312.

These infractions of the rules are virtually unmentioned in the findings of fact by the trial court, but the omission is explained by the fact that the findings were the verbatim adoption of findings submitted by the COMANCHE'S advocate, and signed by the busy trial judge only after appeal had been taken, and almost two years after the actual trial. The Court of Appeals, erroneously considering the case to be only a fact case for the application of *McAllister v. United States*, 348 U.S. 19, 99 L.Ed. 20, merely paraphrased the findings of the district court, that is, paraphrased what was originally the advocate's work, and affirmed with no mention whatsoever of the admitted violations with regard to whistle signals, and with barest passing reference to the lighting violations as "slight non-observance of the rules".

VI.

ARGUMENT

A.

The review of marine collision cases by this court is not very usual; however, in the present case, the issuance of the writ and the review of the case is urgently required because

of the complete overlooking, the virtually complete omission of all reference to, the COMANCHE's admitted violations of the navigation rules from both opinions below. Although a reading of those opinions would not disclose it, the COMANCHE, by its own evidence, was in admitted violation of the very rules compliance with which would have alerted the LYONS CREEK to her presence, averted the accident, and saved two lives. The omission of these violations from both opinions is most significant, and could only be explained by the fact that the district court's findings were in fact prepared by prevailing counsel, signed without change by the district judge almost two years after the trial and after appeal had already been taken; and then were very closely paraphrased, without significant change, by the Court of Appeals in its opinion.

The Court of Appeals' reference to the *McAllister* principle, 348 U.S. 19, 99 L.Ed. 20, is a fundamental misconception of the position actually existing in this case. The problem is not one of fact but is one of law: the COMANCHE was in admitted violation of several mandatory, statutory rules — and most important, rules as to whistle signals and lights, rules compliance with which could have averted this disaster. As to them, there is no dispute of fact at all and *McAllister* does not enter the picture. The problem is strictly one of law, the failure of the courts below to give the proper legal effect and weight to the COMANCHE's admitted statutory faults, i.e., admitted violations of duties made mandatory by law.

The cardinal importance of precise compliance with the navigation rules has long been recognized by this court, which has never been disposed to consider lightly actual

violation of the statutory rules. This court, in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, at p. 136, 22 L.Ed. 148, at p. 151, laid down the classic statement of the rule that where a vessel is in violation of the statutory navigation rules—and the COMANCHE was in admitted violation of several—"it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the statute."*

The findings of the district court, really the work of the advocate, avoided the embarrassment of the COMANCHE's violations by the simple expedient of omitting all reference to them (except one), and equally avoided the effect of *The Pennsylvania* rule by omitting all reference to it. The Court of Appeals, mistakenly considering the case to be no more than a fact case under *McAllister*, fell—most prejudicially to the LYONS CREEK—into the same error.

The result is that *The Pennsylvania* has been overlooked and ignored, and the LYONS CREEK has been cast in sole fault in a case in which, had the COMANCHE obeyed the

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*To the same effect see *Richelieu v. Ont. Nav. Co.*, 136 U.S. 408, 34 L.Ed. 398 (1890); *Belden v. Chase*, 150 U.S. 674, 37 L.Ed. 1218 (1893); *The Martello*, 153 U.S. 64, 38 L.Ed. 637 (1894); *The Brittania*, 153 U.S. 130, 38 L.Ed. 660 (1894); *Lie v. San Francisco & Portland S.S. Co.*, 243 U.S. 291, 61 L.Ed. 727 (1917); *Jessmore-Longview Victory*, 196 F. 2d 689, 1952 A.M.C. 1012 (2 Cir.); *Tidewater v. Syosset*, 203 F. 2d 264, 1953 A.M.C. 730 (3 Cir., failure to sound danger signal, even though other vessel grossly at fault); *Domina-Steel Flyer*, 200 F. 2d 643, 1953 A.M.C. 95 (4 Cir.); *Ben B-San Jacinto*, 219 F. 2d 233, 1955 A.M.C. 546 (a different panel of the 5th Cir.).

law and complied with the duties as to whistle signals and as to lights, made mandatory upon her by law, there would have been no accident and no deaths.

The principle of *The Pennsylvania*, although its phrasing might be different, is not unusual and is no different from the principle of general law that a person in violation of a statutory duty bears the heavy burden of exculpation. That is a very salutary principle in vessel cases, particularly so in consideration of the hazards of navigation; but it is a principle which has been completely ignored in this case.

Accordingly, it is submitted that the decisions below have decided a question of federal law in conflict with *The Pennsylvania*, the applicable decision of this court.

B.

There were two lives lost in this accident, both seamen, members of the crew of the COMANCHE. The claim of one has been settled by her. Had there been no settlement, and had she been sued by the seaman's survivors under the Jones Act, 46 U.S.C. 688, her record of admitted and inexcusable violations would have fixed her with absolute liability under *Kernan v. American Dredging Company*, supra, where, most interestingly, the violation was one of the precise violations of which the COMANCHE was guilty, i.e., improper placing of lights. In the present case, however, we are faced with the anomalous situation that those very violations have been dismissed by the courts below with the casual observation that they were "slight"

It is submitted that there is no conceivable reason for a different result here, and thus that the decision below is in conflict with *Kernan v. American Dredging Company.*

C.

In *Tidewater v. The Syosset*, 203 F. 2d 264, 1953 A.M.C. 730, the Third Circuit held that a barge flotilla was at fault for failing to blow the danger signal upon its failure to understand the course and intention of an oncoming tanker; that it was not relieved of that duty or the effects of that fault by virtue of the fact that the tanker was herself grossly at fault. To the same effect, see *General Seafoods Corp. v. J. S. Packard Dredging Co.*, 120 F. 2d 117, in the First Circuit.

In the present case, the COMANCHE was required by three separate rules to alert the LYONS CREEK by sounding the danger signal: a) when the ascending LYONS CREEK failed to initiate a passing signal before they were within one-half mile of each other; b) when, "for any reason" she failed to understand, or regarded as unsafe, the course or intention of the other; and, c) when she became imperiled by the LYONS CREEK.

There is no pretense that she sounded any danger signal at any time.

In this state of the case, it is submitted that the decision below is in conflict with those herein cited from the First and Second Circuits.

D.

In conclusion, it is respectfully submitted that the multiple violations committed by the COMANCHE should not be condoned, and particularly should not be condoned, as so far they have been condoned, by silence; that this court should take this opportunity strongly to reassert the extreme importance of strict enforcement of the navigation rules, and the holding of vessels violating those rules to full accountability; and that the safety of life and property on navigable waters requires such strict enforcement and full accountability.

Accordingly, petitioner requests that a writ of certiorari issue herein to the Court of Appeals for the Fifth Circuit, and that the decree herein be reversed so as to hold the respondent at fault, either solely or mutually, in which latter event, the total damages should be divided.

Respectfully,

JOS. M. RAULT,

BENJAMIN W. YANCEY,

ALFRED M FARRELL, JR.,
Proctors for Petitioner

TERRIBERRY, RAULT, CARROLL,
MARTINEZ & YANCEY
Of Counsel

March __, 1962.

APPENDIX "A"

Findings of Fact and Conclusions of Law
United States District Court, Eastern District of Louisiana, New Orleans Division

INDIAN TOWING COMPANY, Incorporated

versus

THE Tankship LYONS CREEK.

No. 2953.

United States District Court
E. D. Louisiana,
New Orleans Division.

Sept. 21, 1960.

CHRISTENBERRY, Chief Judge.

The foregoing matter having been tried to the Court without a jury, the Court having heard evidence and the arguments of proctors, and having taken time to consider the matters, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. At all material times libelant, Indian Towing Company, Incorporated, was the owner of the Tug *Comanche*.

2. At all material times, claimant-respondent, Trinidad Corporation, was the owner of the Tankship *Lyons Creek*.

3. The *Comanche* was a 500-hp, single screw diesel tugboat, having a length of 54 feet and a beam of 17 feet. Her engine is pilothouse controlled.

4. The *Lyons Creek* is a 6000-hp turbo-electric tankship of the T-2 class. She is 524 feet in length overall, with a beam of 68 feet.

5. On March 4, 1956, the *Comanche* departed Baton Rouge, Louisiana, bound downstream in the Mississippi River for New Orleans, en route to Mobile, Alabama. She was pushing a tow consisting of the loaded tank barges *KY-17* and *KY-18* made up in tandem, stern-to-stern, the *KY-18* being the lead barge. Each barge was 195 feet in length, 45 feet in beam, 9 feet in depth and loaded with 9,000 barrels of petroleum products. Each had a freeboard of about two feet amidships and about three feet at the bow.

6. The Mississippi River was then within three days of reaching its peak or "crest". The current, between 4 and 5 miles an hour, was approaching its maximum force, and traffic lights were in operation at Algiers Point. Visibility was good; an easterly wind of about 15 miles-per-hour prevailed.

7. The *Comanche* was faced up to the headlog of the *KY-18* in the following manner; two parts of 5 inch manila line led from the *Comanche's* bow bitts to the stern bitts on each side of the *KY-18*, serving as "jockey" or safety lines. One part of 1-inch wire cable, with its eye splice on

the barge's stern bitts, led to a winch amidships on each side of the *Comanche*. In addition, 1-inch wire with its eye splice on the *Comanche's* stern bitts led to the port and starboard stern bitts of the *KY-18*, made taut with ratchets.

8. At approximately 10:15 p. m. on March 4, the *Comanche* flotilla arrived in the vicinity of Avondale Bend several miles above the Huey P. Long Bridge. The tow was handling well and all towing gear was secure. The *Comanche* was displaying proper red and green running lights atop her pilothouse and two red lights in a vertical line astern in accordance with the Western River Rules then in effect. The lead barge, *KY-17*, carried red and green running lights on her port and starboard bow, respectively, and an amber light in the center. These lights were powered by batteries which had been renewed on that very night.

9. As the *Comanche* emerged from Avondale Bend, favoring the west side of the river, her master, Captain Murrell, who was at the wheel, sighted an upbound sea-going vessel some two miles below the Huey P. Long Bridge, apparently shaping up to pass beneath the west span of the bridge. Captain Murrell adjusted course to port, toward the middle of the river, and began to shape up to pass beneath the east span of the bridge. He reduced engine speed to half ahead in anticipation of encountering wave wash from the approaching ship.

10. The upbound vessel, which proved to be the Tankship *Lyons Creek* bound for Norco, Louisiana, in ballast, passed beneath the west span of the bridge at approximately 10:23 p. m.

11. During this time, the Tugboat *San Bernard*, with a quarterboat in tow, was heading downstream making good a speed of 12 to 14 miles-per-hour over the ground, and was preparing to overtake the *Comanche* to port. That vessel was showing white towing lights in a vertical line and red and green running lights on each side of the pilothouse. Her range light was some 22 feet above the water, and her running lights were 15 to 16 feet above the water. The quarterboat, made fast with manila lines on the starboard hip of the *San Bernard*, had a green light on her starboard bow and an amber light on her port bow about 10 feet above the deck.

12. As the *Lyons Creek* cleared the west span of the bridge, the *Comanche* was approximately one and one-eighth miles above the bridge and navigating slightly east of midstream, approximately 500 feet to the eastward of the *Lyons Creek's* course line. The *San Bernard* tow was approximately 250 feet to port and astern of the *Comanche*.

13. The *Lyons Creek* continued to come on without reducing speed, and at 10:25 p. m., at a point approximately one-half mile above the bridge, she passed the *Comanche* starboard-to-starboard, less than five hundred feet off, at full ahead.

14. Just after the *Lyons Creek* passed, the *Comanche* encountered heavy wave wash and turbulence. Waves washed over the decks of her barges and set up severe stresses on the *Comanche's* face wires.

15. As a result of this wave wash action, the *Comanche's* starboard towing gear was caused to part, and she lost con-

trol of her tow in the swift current. Her master put the engines full astern in an effort to regain control at least sufficient to prevent the flotilla from striking the bridge pier. Sternway could not be gathered in time to make this maneuver effective, however, and the *Comanche* was swept downstream at an angle toward the abutment of the bridge.

16. Captain Murrell immediately ordered the engineer on watch to alert the crew. He attempted to free the tug from her barges by chopping the port towing line, but was unable to do so in time. The face barge, *KY-18*, struck the abutment and immediately thereafter, the tug herself struck the pier. The remaining wires and lines parted, and the *Comanche* rolled over to port and capsized as her barges drifted freely downstream. All four of her crew members leaped into the river, but only the master and mate survived.

17. The *San Bernard* had begun to overtake the *Comanche*, about 250 feet to port, and the head of her tow was opposite the *Comanche's* stern as the *Lyons Creek* passed the *Comanche*. Thus, the lookout on the bow of the quarterboat in tow of the *San Bernard* had a clear view of the river. He saw waves wash over the barges in the *Comanche's* tow. He watched them rise and fall in the swells before the turbulence struck the quarterboat causing it to pitch heavily, and the *San Bernard* to "bounce up and down," causing her pilot to slow the vessel to half speed in order to protect the manila lines.

18. After passing the *Comanche*, the *San Bernard* engines were put full ahead again, and she continued toward the bridge. Her deckhand looked astern around the high

superstructure of the quarterboat and saw the running lights of the *Comanche's* lead barge, unaware of the *Comanche's* difficulty.

19. The master of the *Lyons Creek* was on the port wing of the bridge at all material times, but did not see either the *Comanche* or *San Bernard* tows and could not recall even having looked to starboard in the vicinity of where those flotillas were. Neither did the third mate, the pilot, the bow lookout or anyone else aboard the *Lyons Creek* see those vessels.

20. It was stipulated between the parties that on the night of March 4, the *Lyons Creek* averaged 11.8 statute miles-per-hour over the ground at a full ahead harbor speed of 80 r.p.m. The vessel's speed chart shows that she makes a speed of 13.8 knots or 15.8 statute miles-per-hour at 80 r.p.m. in still water. Accordingly, the *Lyons Creek* was proceeding through the water at a speed of at least 15.8 statute miles-per-hour on full ahead (80 r.p.m.) against the 4 to 5 mile current which prevailed when she passed the *Comanche*.

21. Both before and after the casualty the *Lyons Creek* had reduced her speed to half ahead when passing other vessels that night, and those in charge of her navigation testified that they would have slowed to half ahead had they been aware of the presence of the *Comanche* or the *San Bernard*.

Conclusions of Law

1. This court has jurisdiction of the action, and venue

is properly laid in the Eastern District of Louisiana. (28 U.S.C. § 1333).

2. The Tankship *Lyons Creek* passed the *Comanche* at an excessive rate of speed, too close aboard, and her wave wash caused the *Comanche's* tow to break up and go out of control. It is well established that excessive speed in a crowded waterway saddles liability for damage caused thereby on the offending vessel. Dufrene v. The Diversity, D.C.La., 163 F. Supp. 331; 1958 AMC 1953 and cases cited therein. The Columbia, 3 Cir., 1894, 61 F. 220, 221; The Monmouth, D.C.S.D.N.Y. 1891, 44 F. 809; The Chester W. Chapin, D.C.E.D.N.Y. 1907, 155 F. 854; The Majestic, 2 Cir., 1891, 48 F. 730; Lowery v. Hudson River Day Line, Inc., D.C.E.D. N.Y., 132 F. Supp. 629, 1955 A.M.C. 1571, The Hendrick Hudson, D.C.E.D.N.Y., 3 F. Supp. 317, 1933 A.M.C. 120; The Duchess of York, D.C.S.D.N.Y., 1935 A.M.C. 545; The President Roosevelt, D.C.E.D.N.Y., 1931 A.M.C. 1076; The Dewitt Clinton, D.C.E.D.N.Y., 1928 A.M.C. 990. Accordingly, a vessel which sees, or should see, other vessels, whether moored or navigating, in a position where damage to such vessel from her swell is foreseeable, must reduce her speed or direct her course away from them. The *Lyons Creek* did neither. She failed to see the *San Bernard* or the *Comanche* to starboard in close proximity; she directed her course toward the unseen vessels and maintained her speed in excess of 15 miles-per-hour through the water despite the fact that her master and pilot considered it mandatory, and in fact had made it a practice, to slow down when meeting or overtaking a tow in the river.

3. Those in charge of the *Lyons Creek's* navigation did not keep a proper lookout. Article 29 of the Inland Rules,

33 U.S.C.A. § 221. Nobody aboard the *Lyons Creek* saw the downbound *Comanche* flotilla or the *San Bernard* and tow despite the fact that those vessels were well-lighted. The *Comanche* was displaying proper lights. The red, amber and green running lights were displayed on her lead barge although it was conceded that they were less than the prescribed eight feet above the water. The *San Bernard* was showing bright white towing lights and green and red running lights. Her range light was some 22 feet above the water and her running lights were 15 to 16 feet above the water.

4. Despite the niceties of claimant's simulated tests and the speculative hindsight of expert witnesses (each one of whom holds a different view), the testimony of fact witnesses shows that the *Comanche*, with her tow properly rigged, and proceeding with caution, experienced wave wash from the *Lyons Creek* which parted her towing lines, causing the flotilla to go out of control so that boat and barges were swept down-river at the mercy of the current toward the concrete bridge piers. The France, D.C.E.D.N.Y., 1929 A.M.C. 1585; The Dewitt Clinton, D.C.E.D.N.Y., 1929 A.M.C. 990; The President Roosevelt, D.C.E.D.N.Y., 1931 A.M.C. 1076; Dufrene v. The Diversity, D.C., 163 F. Supp. 331, 1958 A.M.C. 1953.

5. The *Comanche* was free from fault.

a—Expert testimony showed that the *Comanche* was properly secured to her tow in accordance with standard practice for pushing loaded barges on inland waters, and she was amply powered for the size and type of tow she had in custody.

b—The *Comanche* flotilla had navigated the high river for some 90 miles without difficulty. Her master reduced speed, as he should have done, and prepared to pass the *Lyons Creek* at a proper distance. Despite these precautions, the *Lyons Creek* drew closer to the *Comanche* and her swells were sufficient to part at least two face wires, and two 5-inch manila jockey ropes.

c—The actions of the *Comanche's* master were all that could be expected of the average reasonable tug master in similar circumstances. His natural thought was to back the engines to prevent the barges, with their volatile cargo, from striking the bridge piers, or at least to take sufficient headway off the runaway tow to reduce the possibility of disaster. In view of the expert testimony, it is doubtful that the *Comanche's* master made any error in these circumstances, but, if he did, it was simply one *in extremis* and, accordingly, excusable. The Yacht Carolettà-Betty K II, D.C.S.D. Fla., 1958 A.M.C. 523; The Evelina-Edward T., 5 Cir., 243 F. 2d 401, 1957 A.M.C. 726.

d—There being no causal connection between the position of the running lights on the *Comanche's* lead barge and the *Lyons Creek's* failure to see the two downbound tows, the fact that these lights were less than eight feet from the water is not material. Smoot Sand & Gravel Corp. v. Baltimore Steam Packet Co. (The Virginia), 102 U.S. App. D.C. 97, 250 F. 2d 422, 1958 A.M.C. 44, 47.

6. Sole fault for the damages arising out of the sinking of the *Comanche* lies with the *Lyons Creek*, and libelant is entitled to a full recovery therefor.

APPENDIX "B"

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18598

TRINIDAD CORPORATION, Claimant of the Tankship "LYONS CREEK",
Appellant,

versus

INDIAN TOWING COMPANY, INC.,
Appellee

Appeal from the United States District Court for the Eastern District of Louisiana.

(August 3, 1961)

Before TUTTLE, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

CAMERON, Circuit Judge: This appeal is from an inter-

locutory decree in favor of libelant below, Indian Towing Company, Inc., for damages sustained in the capsizing of its tow boat *Comanche* when she struck a pier of the Huey P. Long Bridge on the Mississippi River on the night of March 4, 1956. The lower court found that the occurrence was due solely to the negligence of the *Lyons Creek*, owned by the Trinidad Corporation.

Briefly, the facts as found by the trial court are these: The *Lyons Creek* was a 6,000 horsepower turbo-electric tankship. The *Comanche* was a 500 horsepower single screw diesel tugboat. At the time of the accident the *Comanche* was headed downstream on the Mississippi River from Baton Rouge, while the *Lyons Creek* was headed upstream from New Orleans. The *Comanche* was pushing a tow consisting of two loaded tank barges, the KY-17 and KY-18, in tandem stern-to-stern. She displayed red and green running lights on top of the pilot house, and two red lights in a vertical line astern. The lead barge, the KY-18, carried red running lights on her port side and green lights on her starboard bow, with an amber light in the center.

At about 10:15 P.M. on March 4th, the *Comanche* flotilla arrived at Avondale Bend several miles above the Huey P. Long Bridge. She emerged from the bend favoring the west side of the river when she sighted the upbound *Lyons Creek*, which was then about two miles below the bridge and apparently planning to pass beneath the west span of the bridge. The *Comanche* adjusted her course to port, toward the middle of the river, and began shaping up to pass beneath the east span of the bridge. She simultaneously reduced her engine speed to half ahead to minimize the effect of the wave wash which would emanate from the upbound

Lyons Creek. Meanwhile, the Tugboat *San Bernard*, with a quarterboat in tow, was also heading downstream and was preparing to overtake and pass the *Comanche*. The *San Bernard* showed white towing lights in a vertical line some twenty-two feet above water and red and green running lights about fifteen or sixteen feet above water on each side of her pilot house. The quarterboat itself had a green light on her starboard bow and an amber light on her port bow.

As the *Lyons Creek* cleared the west span of the bridge, the *Comanche* was approximately one and one-eighth miles above the bridge and navigating slightly east of midstream, and approximately five hundred feet to the eastward of the *Lyons Creek's* course line. The *San Bernard* tow was approximately two hundred fifty feet to port and astern of the *Comanche*. The *Lyons Creek* continued to come on without reducing speed, and at a point approximately one-half mile above the bridge, she passed the *Comanche* starboard to starboard, less than five hundred feet off, at full ahead. Just after the *Lyons Creek* passed, the *Comanche* encountered heavy wave wash and turbulence. The waves washed over the decks of her barges and set up severe stresses on the *Comanche's* face wires, which bound her securely to her tow.

As a result of this wave wash action, the *Comanche's* starboard towing gear was caused to part, and she lost control of her tow in the swift current. Every effort was made to regain control of the tow, at least sufficient to prevent the flotilla from striking the bridge pier. Sternway could not be gathered in time, however, and the *Comanche* was swept downstream at an angle toward the abutment of the bridge. When this maneuver to regain control of the tow failed,

the captain of the *Comanche* attempted to free the tug from her barges by chopping the towing lines, but was unable to do so in time. The lead barge struck the abutment and immediately thereafter the tug herself struck the pier. The remaining wires and lines parted and the *Comanche* rolled over to port and capsized as her barges drifted freely downstream. Although her entire four man crew leaped into the river, only the master and mate survived.

The *San Bernard*, while abreast of the *Comanche's* tow, was not aware of the *Comanche's* difficulty and therefore increased her speed and continued on. At all material times the master of the *Lyons Creek* was on the port wing of the bridge, but wholly failed to see either the *Comanche* or *San Bernard* tow and could not even recall having looked to starboard in the vicinity of where those flotillas were. In fact, neither the third mate, the pilot, the bow lookout nor anyone else aboard the *Lyons Creek* saw those vessels. At the time of the passing the *Lyons Creek* was traveling at full ahead, or at least 15.8 miles per hour against a four to five mile current which then prevailed.

Both before and after the casualty the *Lyons Creek* had made a practice of reducing her speed to half ahead when passing other vessels, and those in charge of her navigation testified that they would have slowed to half ahead had they been aware of the presence of the *Comanche* or the *San Bernard*.

Based upon these findings of fact the lower court concluded that the *Lyons Creek* had passed the *Comanche* at an excessive rate of speed, too close aboard, so that her wave wash forced the *Comanche's* tow to break up and go

out of control, that those in charge of the *Lyons Creek* had failed to keep a proper lookout, as evidenced by their failure to see two fully lighted tows; that the *Comanche* was properly rigged and free from fault, and the *Lyons Creek* was solely responsible for the damages arising out of the capsizing of the *Comanche*.

Basically, this case presents an attack by the appellant upon the findings of fact of the trial court, the appellant in essence asserting such findings to be "clearly erroneous." Under settled principles of law,[1] which we have recently referred to as the "concept of F. R. Civ. P. 52 (a) judicially engrafted onto the admiralty procedure," *O Y Finlayson, Etc. v. Pan Atlantic Steamship Corp.*, 1958 259 F. 2d 11, 12, a court of review is bound by the findings of a trial court in a non-jury case and they will not be set aside unless it is clearly demonstrated that such findings are without adequate credible evidentiary support in the record or were induced by an erroneous view of the law. And the burden of demonstrating this is upon the party seeking to have the findings overturned. *Cedillo v. Standard Oil Co.*, 5 Cir., May 26, 1961. F 2d

After a careful study of the voluminous record before us we are convinced that the showing made contained ample evidence of the character necessary to support and uphold these findings. Since this is true, we will not set aside the findings of the trial court.

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[1] McAllister v. United States, 1954, 348 U. S. 19; Ohio Barge Lines, Inc. v. Ohio Transport, Inc., 5 Cir., 1960, 280 F. 2d 448; Kwong v. Occidental Life Ins. Co. of California, 5 Cir., 1959, 273 F. 2d 691; Manufacturer's Casualty Insurance Co. v. Infrusion-Prepakt, Inc., 5 Cir., 1959, 264 F. 2d 758; and Burgher v. Campbell, 5 Cir., 1957, 244 F. 2d 863. See also Arkansas Valley Feed Mills, Inc. v. Fox Deluxe Foods, Inc., 8 Cir., 1960, 273 F. 2d 804.

The appellant also charges that certain lights on the *Comanche* and her lead barge failed for various reasons to comply with the Pilot Rules for Western Rivers, claiming that such failure "condemns the *Comanche* and exonerates the *Lyons Creek*." We are unable to accept this argument. We feel, as did the court below, that there was no causal connection between the slight nonobservance of the rules regulating the height of the lights and the total failure of those in charge of the *Lyons Creek* to see the two downbound tugs, *Comanche* and *San Bernard* and their tows. There is an adequate showing that the *Comanche's* lights were sufficient to alert the *Lyons Creek*, had the *Lyons Creek* maintained a proper and vigilant lookout. In fact, the *San Bernard*, whose lighting amply complied with the Rules, was not seen by the *Lyons Creek* although she was substantially abreast of the *Comanche* when the *Lyons Creek* passed at an excessive speed. We think that the trial court correctly found that ". . . . the fact that the *Comanche's* lights were less than 8 feet from the water is not material." Cf. *Lind et al v. United States*, 2 Cir., 1946, 156 F. 2d 231, 233; *The Smoot Sand and Gravel Corp. v. Baltimore Steam Packet Co.*, D. C. Cir., 1957, 250 F. 2d 422; and *The Transfer No. 8*, 2 Cir., 1928, 25 F. 2d 628.

In an attempt to demonstrate the improbability that the "wave wash," such as that created by the *Lyons Creek*, would break up a properly rigged tow, appellant showed both the trial court and this Court moving pictures taken at the point of the casualty on a different date. However, we are not persuaded by the pictures, considered in con-

nection with the other evidence in this case, that the trial court's findings on this point were clearly erroneous.

It appearing that the court below committed no reversible error, its judgment is

AFFIRMED.

APPENDIX "C"

Statutes and Coast Guard Pilot Rules for the Western Rivers

(Emphasis supplied in order to indicate precise mandatory rules of which COMANCHE was in admitted violation.)

The statutes, commonly known as the Western River Rules, in their pertinent parts are:

Title 33 U.S.C. § 301. Adoption of rules

The following regulations for preventing collisions shall be followed by all vessels upon the waters of the Mississippi River between its source and the Huey P. Long Bridge and all of the tributaries emptying thereinto and their tributaries, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway, and the Red River of the North; and are declared special rules duly made by local authority. R.S. § 4233; Aug. 19, 1890, c. 802, 26 Stat. 320; Feb. 8, 1895, c. 64, 28 Stat. 645; Feb. 19, 1895, c. 102, § 1, 28 Stat. 672; June 7, 1897, c. 4, 30 Stat. 96; May 21, 1948, c. 328, § 4, 62 Stat. 249; Aug. 8, 1953, c. 386, § 2, 67 Stat. 497.

Title 33 U.S.C. § 311. Time for lights; prescribed lights exclusive (Rule 2)

The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights, or impair their visibility, shall be exhibited. R.S.

§ 4233; Feb. 19, 1895, c. 102, § 1, 28 Stat. 672; May 21, 1948, c. 328, § 4, 62 Stat. 250.

Title 33 U.S.C. §312. Lights of vessel towing alongside or pushing vessel or vessels (Rule 3)

A steam vessel when towing another vessel or vessels alongside or by pushing ahead shall carry —

(a) On the starboard side a green light so constructed and fixed as to show the light from ahead and not more than half a point on the port bow, to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least three miles.

(b) On the port side a red light so constructed and fixed as to show the light from ahead and not more than half a point on the starboard bow, to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least three miles.

(c) The said green and red side lights shall be fitted with inboard screens painted black and projecting at least three feet forward from the light, so as to prevent these lights from being seen more than half a point across the bow.

(d) At or near the stern, where they can best be seen, two red lights in a vertical line, one over the other, not less than three feet apart, of such a character as to be visible from aft for a distance of at least two miles, and so screened as not to be visible forward of the beam. R.S.

§ 4233; Feb. 19, 1895, c. 102, § 1, 28 Stat. 672; May 21, 1948, c. 328, § 4, 62 Stat. 250.

Title 33 U.S.C. § 343. Steam vessels meeting end on; signals (Rule 18)

(a) When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, except when one steam vessel is ascending and the other descending a river, it shall be the duty of each to pass on the port side of the other, and to alter course to starboard sufficiently so that this can be done in safety. This maneuver shall require an exchange of one-blast signals when the vessels are not less than one-half mile apart, and either vessel shall blow the first signal which the other shall promptly answer.

(b) When an ascending steam vessel is approaching a descending steam vessel on a river, the signals for passing shall be one distinct blast of the whistle by each vessel if passing port to port, and two distinct blasts of the whistle if passing starboard to starboard.

The pilot of the ascending steam vessel shall give the first signal for passing, which shall promptly be answered by the same signal by the pilot of the descending steam vessel, if safe to do so, and both shall be governed accordingly; but if the pilot of the descending steam vessel deems it dangerous to take the side indicated by the ascending steam vessel, he shall immediately signify that fact by sounding four or more short and rapid blasts, the danger signal, and it shall be the duty of the pilot of the ascending steam vessel to answer by a similar danger signal and the engines of both shall immediately be stopped and backed,

if necessary, until signals for passing are given, answered, and understood. After sounding the danger signal by both vessels, the pilot of the descending steam vessel shall indicate by his whistle the side on which he desires to pass, and the pilot of the ascending steam vessel shall govern himself accordingly, the descending steam vessel being entitled to the right-of-way.

The pilot of the descending steam vessel shall not blow the first signal, except that if the other vessel has not whistled when the steam vessels, or the forward end of their tows, if being pushed ahead, are within one-half mile of each other, he shall blow the first danger signal, which shall be promptly answered by a danger signal by the ascending vessel; but whether answered or not, the pilot of the descending vessel shall indicate the side on which he desires to pass, and both vessels shall be governed accordingly. R.S. § 4233; Feb. 19, 1895, c. 102, § 1, 28 Stat. 672; May 21, 1948, c. 328, § 4, 62 Stat. 250.

Title 33 U.S.C. § 349. Danger signals; responding signals; additional signals (Rule 24)

(a) *If, when steam vessels are approaching each other either vessel for any reason fails to understand, or regards as unsafe, the course or intention of the other, the vessel in doubt shall immediately so signify by giving several short and rapid blasts of her whistle, at least four, the danger signal.*

(b) Whenever a steam vessel, whether ascending or descending, is nearing a bend in a channel where, from the height of the banks or other cause, a steam vessel ap-

proaching from the other direction cannot be seen for a distance of six hundred yards, such steam vessel, when within six hundred yards of such bend — or if she have a tow projecting ahead, then when the head of such tow is within six hundred yards of the bend — shall give a signal by three distinct blasts of her whistle, which signal shall be answered by a similar signal given by any approaching steam vessel that may be within hearing around the bend. Should such signal be so answered by a steam vessel upon the farther side of such bend, then, immediately upon sighting each other, the usual signals for meeting and passing shall be given and answered. Regardless of whether an approaching vessel on the farther side of the bend is heard, such bend shall be rounded with alertness and caution.

(c) When a steam vessel is moved from her dock, or anchorage, she shall give the same signal as in the case of a steam vessel nearing a bend, but she and any approaching vessel shall be governed by sections 350 and 351 of this title until her course is apparent, and then both vessels shall be governed by the other steering and sailing rules.

(For additional whistle signals and other regulations established by the Commandant, United States Coast Guard, see Pilot Rules for Western Rivers as prescribed under section 353 of this title.) R.S. § 4233; Feb. 19, 1895, c. 102, § 1, 28 Stat. 672; May 21, 1948, c. 328, § 4, 62 Stat. 250.

Pursuant to the statute the Commandant, U. S. Coast Guard, promulgated supplementary regulations commonly known as the Pilot Rules for Western Rivers. Their pertinent parts are:

Title 33 C.F.R. § 95.01 *General instructions.*

The regulations in this part apply to vessels navigating the Red River of the North, the Mississippi River and its tributaries above Huey P. Long Bridge, the Mobile River and its tributaries above Choctaw Point, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway.

Title 33 C.F.R. § 95.09 *Danger and cross signals.*

(a) *The alarm or danger signal shall consist of four or more short and rapid blasts.* Steam vessels are forbidden to use what has become technically known among pilots as "cross signals," that is answering one whistle with two, and answering two whistles with one. In all cases and under all circumstances, a pilot receiving either of the whistle signals provided in the rules in this part with which, for any reason, he deems it injudicious to comply, instead of answering it with a cross signal, shall at once observe the provisions of this section.

(b) *The pilot of any steam vessel shall sound the alarm or danger signal whenever required by the law, or any of the regulations hereinafter contained; that is to say, as follows:*

(1) Whenever it is dangerous to take the side indicated by the passing signal of another vessel; or,

(2) Whenever any steam vessel does not understand or is in doubt regarding the signal of another steam vessel; or,

(3) *Whenever, from any cause, one steam vessel is imperiled by another.*

Title 33 C.F.R. § 95.19 *Passing signals.*

The passing signals, by the blowing of the whistle, shall be given and answered by pilots, in all weathers, when approaching each other; and, wherever possible, the signals shall be given and answered before the steam vessels, or if towboats pushing tows, the head of such tows, have arrived at a distance of half a mile of each other.

Title 33 C.F.R. § 95.29 *Lights for barges towed ahead or alongside.*

(a) *When one or more barges is towed by pushing ahead of a steam vessel such tow shall be lighted by an amber light at the extreme forward end of the tow and at the centerline of the tow, or as near the centerline as it is practicable to carry such light; a green light on the starboard side and a red light on the port side,* so placed that they mark the tow at its maximum projection to starboard and port, respectively. When a barge is towed alongside a steam vessel on the starboard side, such barge shall have a green light on the starboard bow; if towed alongside on the port side, a red light on the port bow. When barges are towed on either side of a steam vessel two or more abreast, the outboard barges only shall carry the appropriate side light.

(b) *The colored side lights referred to in paragraph (a) of this section must be fitted with inboard screens so as to prevent them from being seen more than half-a-point across the bow, of such a character as to be visible on a*

dark night with a clear atmosphere at a distance of at least three miles; so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on either side. The amber light shall be screened so as not to be visible more than two points abaft the beam and shall likewise be visible at least three miles. *All of these lights shall be carried at least eight feet above the surface of the water* and at approximately the same height. (Effective from January 1, 1949 until the amendment of August 9, 1958, subsequent to the occurrence of this casualty.)